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No. 97-1985

In the Supreme Court of the United States

OCTOBER TERM, 1997

ELLIS E. NEDER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether materiality is an element of mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343), and bank fraud (18 U.S.C. 1344).

2. Whether the trial court's failure to instruct the jury on the materiality element of the tax charges in this case was harmless error because materiality was not in dispute at trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 136 F.3d 1459.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1998. The petition for a writ of certiorari was filed on June 9, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(c)); one count of conspiring to commit

that offense (18 U.S.C. 1962(d)); one count of conspiring to defraud a financial institution (18 U.S.C. 371); 12 counts of bank fraud (18 U.S.C. 1344); nine counts of mail fraud (18 U.S.C. 1341); nine counts of wire fraud (18 U.S.C. 1343); 37 counts of making false statements to a financial institution (18 U.S.C. 1014); and two counts of filing false income tax returns (26 U.S.C. 7206(1)). He was sentenced to 147 months' imprisonment, to be followed by five years' supervised release, and was ordered to pay approximately $25 million in restitution. Pet. App. 14a-20a. The court of appeals affirmed. *Id.* at 1a-13a.

1. Between August 1984 and November 1986, petitioner purchased land using shell corporations. Petitioner then resold the land at much higher prices to limited partnerships that he controlled. Petitioner used bank loans to finance the resales. Because the loans typically amounted to 70% of the inflated price, the loan proceeds substantially exceeded the original cost of the land to petitioner's shell corporations. Petitioner made numerous false statements in order to conceal from lenders that he controlled the shell corporations that had first bought the land and that he had engaged in a scheme to inflate the apparent value of the land. The lenders would not have made the loans in question had petitioner not made false statements to conceal his scheme. Gov't C.A. Br. 3-7.

After each transaction, petitioner deposited to his personal account a check reflecting the amount by which the loan proceeds exceeded the original purchase price of the land. In that way, petitioner obtained more than $7 million. Petitioner made only $75,000 in payments before defaulting on all of the loans, which totaled approximately $17 million. Gov't C.A. Br. 7-8.

Petitioner also obtained a $4,150,000 construction loan to build condominiums on a project known as Cedar Creek. The bank loan officer told petitioner that, in order to qualify for the loan, he would have to make advance sales of 20 units. Petitioner initially was able to sell only 13 units, so he secured an additional seven buyers by making their down payments in amounts ranging from $4,000 to $8,900. Petitioner thereby obtained the construction loan, but he subsequently defaulted without repaying any of the principal. Petitioner also arranged to have the down payments transferred back to him from the escrow account into which they had been placed. The lender would not have made the loan had it been aware that petitioner rather than the buyers had made the down payments on seven of the sales. Gov't C.A. Br. 9-11.

Petitioner used a similar scheme to obtain a $5,400,000 loan for development of condominiums at another project referred to as the Southern Grove project. The bank loan officer required that petitioner have 25 reservation agreements signed by prospective buyers, and that the prospective buyers each pay a $500 deposit to establish their genuine interest in the project. Petitioner solicited people to sign reservation agreements, offering to pay the $500 deposit fee in return for their signatures. Between July and October 1985, petitioner obtained 19 signed reservation agreements. Petitioner signed each of those agreements as the seller, but he also made each of the deposit payments for the supposed buyers and forged the signatures of two of the supposed buyers. In October 1985, petitioner obtained the construction loan. The lender would not have made the loan had it been aware that petitioner had paid the deposits for the supposed buyers. Gov't C.A. Br. 11-13.

After he obtained the loan for the first phase of the Southern Grove project, petitioner sought an additional loan for the next phase. The loan officer told petitioner that the bank would not issue a construction loan for a given building unless petitioner made advance sales of 70% of the units in the building. The loan officer also said that the buyers had to make nonrefundable deposits of 10% of the purchase price, and that the buyers had to qualify for a mortgage loan from the bank. Petitioner subsequently obtained ten signed reservation agreements, but he himself provided the funds that the buyers used to make the required deposits of approximately $8,000. In making its loan decision, the lender relied on the misrepresentations in the reservation agreements that the buyers were the source of the deposits. Gov't C.A. Br. 13-14.

Petitioner attempted to obtain a $4,700,000 loan relating to a project called The View. As part of that attempt, petitioner directed a lawyer to execute a false deed and promissory note. Although the lender approved the loan application, and petitioner and the lender signed a commitment letter, the transaction fell through when petitioner's lawyer refused to sign an opinion letter representing that petitioner's financial status had not changed for the worse. Gov't C.A. Br. 15-17.

In November 1986, petitioner obtained a $6 million land acquisition loan for a project known as the Reddie Point project. He fell behind in his payments, but in July 1987 he negotiated a consolidated $14 million loan to cover land acquisition and construction costs. Under the terms of the revised loan, petitioner could submit draw requests for work actually performed on the project. Instead, he submitted false draw requests and obtained approximately $3 million, which he used to

make interest payments on his other loans. Gov't C.A. Br. 18-20.

Finally, petitioner failed to report on his personal income tax return more than $1 million in income for 1985 and more than $4 million in income for 1986. Those amounts represented the profits from petitioner's land acquisition scheme, which petitioner had deposited into his personal account and used for his own purposes. Gov't C.A. Br. 20-22.

2. At trial, the district court instructed the jury on the bank fraud, false statement, and tax offenses that the question of materiality was not for the jury to decide. Pet. App. 28a, 30a, 31a, 34a. On the wire and mail fraud offenses, the district court did not include materiality as an element. *Id.* at 31a-34a. Petitioner objected to the district court's refusal to require that the jury make findings of materiality on all of the offenses at issue. *Id.* at 3a; Gov't Supp. C.A. Br. 1. The district court subsequently made a finding, outside of the presence of the jury, that the evidence established materiality beyond a reasonable doubt on all counts at issue. Pet. App. 3a; Gov't Supp. C.A. Br. 1-2.

3. On appeal, petitioner contended that the district court had committed reversible error in refusing to submit the question of materiality to the jury. The court of appeals rejected that contention. Pet. App. 3a-13a.

In rejecting petitioner's challenge to his false statement convictions under 18 U.S.C. 1014, the court of appeals relied on this Court's decision in *United States* v. *Wells*, 519 U.S. 482 (1997), which held that materiality is not an element of that offense. Pet. App. 3a-5a. The court of appeals further held that, under the analysis in *Wells*, materiality is not an element of mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343), or

bank fraud (18 U.S.C. 1344). Pet. App. 6a-10a. Finally, the court of appeals held that, although materiality is an element of the offense of falsely subscribing to a tax return in violation of 26 U.S.C. 7206(1), and the district court erred in failing to submit the issue of materiality to the jury on those counts, the error was harmless, because "materiality was not in dispute regarding [petitioner's] tax fraud offense." Pet. App. 12a. The court of appeals observed that, under the tax statute at issue, "any failure to report income is material," and petitioner's "convictions were based on his failing to report $1,372,360 in income in 1985 and $4,355,766 in income in 1986." *Ibid.* Indeed, the court noted, petitioner did not contest the materiality of these sums of unreported income. *Ibid.* Accordingly, the court found that the error "did not contribute to the verdict obtained." *Id.* at 13a (quoting *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991)).

DISCUSSION

1. Petitioner contends (Pet. 20-25) that the courts of appeals are in conflict on the question whether materiality is an element of mail fraud under 18 U.S.C. 1341, wire fraud under 18 U.S.C. 1343, and bank fraud under 18 U.S.C. 1344. Although the court of appeals correctly held that materiality is not an element of those offenses, we agree with petitioner that there is a conflict among the courts of appeals on the question and that the conflict warrants this Court's review.

a. Sections 1341, 1343, and 1344 of Title 18 criminalize various kinds of conduct involving schemes or artifices to defraud or to obtain money or property "by means of false or fraudulent pretenses, representations, or promises." Section 1341 prohibits the use of the mails as part of such a scheme; Section 1343 prohibits the use of wire, radio, or television communica-

tions as part of such a scheme; and Section 1344 prohibits such schemes involving financial institutions. Unlike many other federal criminal statutes, Sections 1341, 1343, and 1344 do not use the word "material" in defining the offense. "Thus, under the first criterion in the interpretative hierarchy, a natural reading of the full text, materiality would not be an element of" those offenses. *United States* v. *Wells*, 519 U.S. 482, 490 (1997) (citation omitted).

There is no basis for importing into those criminal statutes civil law notions of what is required for an action in fraud. Although civil torts sounding in fraud do typically "require[] a *material* misrepresentation or omission," *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996), Sections 1341, 1343, and 1344 reach more broadly than civil tort law does. For example, a civil action sounding in fraud will generally lie only if the victim justifiably relies to his detriment on the defendant's deceptive statements or conduct. See Restatement (Second) of Torts § 537 (1977); 1 J. Story, *Commentaries on Equity Jurisprudence* §§ 199, 202-203 (13th ed. 1886). Sections 1341, 1343, and 1344, however, impose no such requirement. See, *e.g.*, *United States* v. *Coffman*, 94 F.3d 330, 333-334 (7th Cir. 1996), cert. denied, 117 S. Ct. 1425, 1426 (1997). See generally *Durland* v. *United States*, 161 U.S. 306, 312-315 (1896) (predecessor of mail fraud statute "is broader" than common-law doctrine of "false pretences"; "[i]t was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed").

The mail, wire, and bank fraud statutes prohibit schemes and artifices that are intended to defraud, and it suffices to establish a violation of those provisions

that the defendant *intended* that his deceptive conduct or statements would deprive the victim of some right or interest. There is no basis to impose the additional requirement, connoted by the word "material," that the deceptive conduct or statements *in fact* had "a natural tendency to influence, or [were] capable of influencing" the victim. *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995) (defining "materiality").

b. The courts of appeals have reached conflicting conclusions on the question whether materiality is an element of Sections 1341, 1343, and 1344. See Pet. 21-22 & nn.10-11. Although many of the decisions petitioner cites antedate this Court's decision in *Wells*, the conflict has persisted and shows no sign of abating. The Eleventh Circuit in this case relied on *Wells* in holding that materiality is not an element of Sections 1341, 1343, and 1344. Pet. App. 3a-10a. The Tenth Circuit has reiterated, after *Wells*, its view that

> [a]lthough materiality is not an independent element of a wire fraud prosecution, there is a materiality aspect to the determination whether the acts of an accused give rise to a scheme to defraud, that is appropriately submitted to the jury as one component of the larger factual question as to the existence of fraud and a scheme to defraud.

United States v. *Cochran*, 109 F.3d 660, 667 n.3 (10th Cir. 1997) (quotation marks omitted). See also *United States* v. *Slaughter*, 128 F.3d 623, 629 (8th Cir. 1997) (after *Wells*, adopting Tenth Circuit's approach).

The Second, Sixth, and Ninth Circuits, in contrast, have held, after *Wells*, that materiality is an element of various of the offenses at issue. See *United States* v. *Rodriguez*, 140 F.3d 163, 167 (2d Cir. 1998) (Section 1344); *United States* v. *DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998) (Section 1341); *United States* v. *Nash*, 115 F.3d 1431, 1436 (9th Cir. 1997) (Section 1344), cert. denied, 118 S. Ct. 1054 (1998). The Fifth and Seventh Circuits, finally, have treated the issue as an open one in light of *Wells*. See *United States* v. *Moser*, 123 F.3d 813, 825-827 (5th Cir.) (Section 1341), cert. denied, 118 S. Ct. 613, 642, 884 (1997); *United States* v. *Pribble*, 127 F.3d 583, 588 (7th Cir. 1997) (Section 1344), cert. denied, 118 S. Ct. 1056 (1998).

The conflict merits this Court's review. Mail fraud, wire fraud, and bank fraud are frequently prosecuted offenses. Moreover, as petitioner correctly notes (Pet. 25), they are often included as predicate offenses in both criminal and civil cases under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* The Court should grant the petition to resolve the question whether those offenses include an element of materiality.

2. Petitioner also challenges (Pet. 15-20) the court of appeals' decision to conduct harmless-error review of the district court's failure to instruct the jury on whether petitioner's false statements on his tax returns were material.[1] Petitioner notes (Pet. 9-14) that there

[1] The harmless-error question arises only if there was an error. Section 7206(1) provides that it is an offense to subscribe to a tax return under penalty of perjury when the taxpayer does not believe the return "to be true and correct as to every material matter." The court of appeals rejected the government's argument that there was no error at all because false statements concerning income on a tax return are "material" as a matter of law. Pet. App. 10-11a. Although one court of appeals has accepted the argument that the materiality of false statements of income in a prosecution under Section 7206(1) presents a legal question for the court, see *United States* v. *Klausner*, 80 F.3d 55, 60-61 (2d Cir. 1996), the other courts of appeals that have addressed the issue have concluded that *United States* v. *Gaudin*, *supra*, requires

is a conflict among the courts of appeals on the question whether the erroneous failure to instruct the jury on an element of an offense is subject to harmless-error analysis. Although the court of appeals resolved that question correctly by holding that such an error can be harmless, the conflict on that issue warrants this Court's review.[2]

"[I]f the defendant [in a criminal case] had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). The Court has identified certain fundamental constitutional errors—so-called "structural" errors—that are never harmless.[3]

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submission of the materiality issue to the jury. See Pet. App. 11a (collecting cases). We do not press here any argument that the district court was correct in withholding the issue of materiality from the jury on the Section 7206(1) counts.

[2] Because it held that Sections 1341, 1343, and 1344 did not require proof of materiality, the court of appeals did not reach the government's alternative argument on those counts that any error was harmless because (1) petitioner did not dispute materiality; (2) the proof of materiality was overwhelming; and (3) no reasonable jury could have failed to find materiality in light of the jury's finding that petitioner "intended to deceive others and to obtain by false or fraudulent pretenses, representations or promises money or property from persons so deceived." See Gov't Supp. C.A. Br. 9-10 (quoting from trial transcript); Gov't Second Supp. C.A. Br. 16-34. If this Court were to conclude that materiality is an element of any of those offenses, those harmless-error arguments would have to be confronted.

[3] See *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (denial of public trial); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (total denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased judge).

The failure to submit an element to the jury for its decision, however, is not such an error. See *California* v. *Roy*, 519 U.S. 2, 5 (1996) (per curiam) ("The specific error at issue here—an error in the instruction that defined the crime—is * * * as easily characterized as a misdescription of an element of the crime[] as it is characterized as an error of omission. No one claims that the error * * * is of the 'structural' sort that defies analysis by 'harmless error' standards."; "The case before us is a case for application of the 'harmless error' standard.") (quotation marks and citation omitted). See also *Johnson* v. *United States*, 117 S. Ct. 1544, 1550 (1997) ("It is by no means clear" that the failure to submit the element of materiality to the jury constitutes structural error.).

Petitioner properly concedes (Pet. 16-19) that a failure to instruct the jury on an element is harmless if the jury's verdict on another element is "functionally equivalent" to a finding by the jury as to the omitted element. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993). The question raised by the court of appeals' decision is whether the failure to instruct the jury on an element is also harmless if the existence of the element "was not in dispute" (Pet. App. 12a), in the sense that it was not contested by the defendant at trial and the proof on the element was overwhelming.[4] Contrary to

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[4] A number of the courts of appeals, including the court below, employ a particularized definition of "materiality" applicable to the offense of falsely subscribing to a tax return under 26 U.S.C. 7206. See Pet. App. 12a ("Under § 7206(1), a 'material matter' is any information necessary to a determination of a taxpayer's income tax liability"; citing cases). Under that definition, a jury's finding that a defendant falsely stated the amount of his income will often

petitioner's claim (Pet. 15-19), this Court's cases do not conclusively resolve the question.[5] And the courts of appeals have given conflicting answers. The Eleventh Circuit has held that the failure to instruct on an element is harmless error where the evidence leaves no doubt on the issue and the issue is "uncontroverted." See *United States* v. *Fern*, 117 F.3d 1298, 1307-1308 (11th Cir. 1997); Pet. App. 11a-13a; cf. *Hart* v. *Stagner*, 935 F.2d 1007, 1013 (9th Cir. 1991) (mandatory presumption as to element harmless where, *inter alia*, defendant did not contest element at trial).[6] The

be the "functional equivalent" of a finding of materiality. Cf., *e.g.*, *ibid.* ("any failure to report income is material") (quoting *United States* v. *Holland*, 880 F.2d 1091, 1096 (9th Cir. 1989)). Cases arising under Section 7206(1) therefore may raise somewhat distinctive harmless-error issues. The court of appeals in this case, however, rested its harmlessness holding on the absence of a dispute at trial on materiality, not on a conclusion that the jury's verdict on other elements was the "functional equivalent" of a verdict on materiality under Section 7206. Pet. App. 12a. More generally, the courts of appeals have reached conflicting conclusions on the harmlessness of a failure to instruct on materiality under Section 7206. Compare Pet. App. 11a-13a (error harmless where element not disputed), with, *e.g.*, *United States* v. *DiRico*, 78 F.3d 732, 737-738 (1st Cir. 1996) (error harmful).

[5] Last Term the Court considered but did not decide the closely related question whether the failure to instruct on an element is harmless if the defendant affirmatively admits the existence of the element. See *Rogers* v. *United States*, 118 S. Ct. 673 (1998) (dismissing writ as improvidently granted).

[6] Petitioner suggests that the Second and Eighth Circuits have also so held. See Pet. 10 n.4 (citing *Bilzerian* v. *United States*, 127 F.3d 237, 242 (2d Cir. 1997), petition for cert. pending, No. 97-1892, and *United States* v. *Raether*, 82 F.3d 192, 194 (8th Cir. 1996)). In *Bilzerian*, however, the court found the absence of a materiality instruction on two counts to be harmless in light of the jury's finding on two other counts that the same statements were

Fourth Circuit, in contrast, has reversed a conviction on the ground that the district court failed to instruct on an element, even though the element—whether a credit union was federally insured—was not disputed and the proof of the element was overwhelming. *United States* v. *Johnson*, 71 F.3d 139, 141-145 (1995). Other courts have also concluded that the failure to instruct the jury on an element is reversible error even if "the jury could not have reasonably arrived at any other conclusion." *Waldemar* v. *United States*, 106 F.3d 729, 732 (7th Cir. 1996) (court does not expressly indicate whether issue was contested); see *United States* v. *DeFries*, 129 F.3d 1293, 1311-1312 nn.12-13 (D.C. Cir. 1997) (issue contested); *United States* v. *DiRico*, 78 F.3d 732, 735-736 (1st Cir. 1996) (same). See also, *e.g.*, *United States* v. *Raether*, 82 F.3d 192, 194-195 (8th Cir. 1996).

The conflict merits review by this Court. Whether a failure to instruct on an element is harmless error when the element's existence was not in dispute—as the record in this case abundantly showed—is a recurring and important question. The Court should grant the petition to resolve the conflict among the courts of appeals on that question.

material. 127 F.3d at 242. In *Raether*, the Eighth Circuit held that the failure to instruct on an element required reversal, and suggested that such errors can be harmless only if the jury has made a finding that is functionally equivalent to the omitted element. 82 F.3d at 194-195. Petitioner concedes (Pet. 16 n.9) the validity of that form of harmless-error analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1998